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1994

6-13-1994

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Citation Information

Byrne, J. Peter, "The Regulatory Takings Doctrine: A Critical Overview" (1994). *Regulatory Takings and Resources: What Are the Constitutional Limits? (Summer Conference, June 13-15)*.
<https://scholar.law.colorado.edu/regulatory-takings-and-resources/2>

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J. Peter Byrne, *The Regulatory Takings Doctrine: A Critical Overview*, in REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS? (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1994).

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The Regulatory Takings Doctrine: A Critical Overview

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May 13, 1994

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I. Introduction

The regulatory takings doctrine rests on the proposition that regulation of property use alone, without appropriation, occupation, or use by the government can "take" property within the meaning of the Fifth Amendment. As a result of this doctrine, courts may hold statutes or regulations restricting use unconstitutional, when the judges believe that the regulation goes "too far" in restricting the owner's property rights. As a remedy, the government must either amend the statute or regulation or pay compensation for the lost value of the owner's property right; the government may also need to pay for the owner's temporary losses in any event.

In my view, the regulatory takings doctrine is a pernicious mess that ought to be abolished. Judged by traditional constitutional standards, the doctrine lacks a legitimate base in constitutional text, tradition, or policy. Current rules are a hodgepodge that can neither be justified nor examined to yield confident predictions about future judicial decisions. The doctrine has become an unprincipled sword for conservative judicial activism seeking to defeat democratic control over natural resource decisionmaking. As such, aggressive interpretations of the regulatory takings doctrine have had the purpose and effect of inhibiting experimentation with new environmental initiatives.

II. Neither the Text, the Framers' Intent, nor the First One Hundred Years of Judicial Interpretation Support the Regulatory Takings Doctrine.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Plainly the language prohibits uncompensated appropriation of property rights by the government. (Although the Fifth Amendment applies only to the federal government, the Court has long held that it applies to the states through the Fourteenth Amendment.) But the verb "take" does not supply a standard by which a wide range of government use regulations may be evaluated, as would have the words, "too far" or "unreasonable." The framers used such words of degree throughout the Bill of Rights.

Available evidence confirms that the framers intended the takings clause to reach only appropriations. The leading study concludes that James Madison, the author of the fifth Amendment, intended the clause "to apply only to direct physical taking of property by the federal government." (William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694 (1985).) Contemporaries were concerned about uncompensated appropriations of land by the colonial and state governments; but, there is no evidence of concern about the common regulation of property use in settled areas. While the framers plainly valued property rights generally, that does not help interpret the scope of a specific prohibition in the Bill of Rights.

Judicial interpretation of the takings clause adhered to this narrow interpretation for more than one hundred years after the Fifth Amendment was adopted. Courts repeatedly held that regulations that restricted use but amounted neither to outright expropriation nor permanent physical occupation could not be a takings. As the Supreme Court stated in 1887 in Mugler v. Kansas:

A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, safety of the community, cannot, in any just sense be deemed a takings or an appropriation of property for the public benefit. Such

legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." (123 U.S. at 668-69.)

Many other notable cases confirmed the same analysis. (See Hadacheck v. Sebastian, 239 U.S. 394 (1915); Commonwealth v. Alger, 7 Cush, 53 (Mass. 1853); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. 1826).)

III. Pennsylvania Coal, the Fountainhead of the Regulatory Takings Doctrine, Was a Poorly Considered Decision that Ought to be Overruled.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 292 (1922), held that a state statute, which made it unlawful to mine coal in such a way as to cause the surface property of another to collapse, regulated the coal company's property right so severely that it amounted to a taking of its property without just compensation. Modern regulatory takings cases look back to Pennsylvania Coal as a touchstone, but Justice Holmes's decision itself is opaque and unsatisfactory. (For an intelligent and subtle, if, perhaps, too lenient assessment, see Carol Rose, Mahon Reconsidered: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984))

For present purposes, permit me to highlight several deficiencies in the opinion that ought to deny it continuing authority. First, Holmes's says nothing about the constitutional rule he is displacing; he neither acknowledges that the Court is displacing numerous prior decisions nor explains why they are wrong or inadequate. Second, Holmes does not address the related question of what constitutional values might be furthered by the new rule.

Third, the decision does not identify what aspect of the company's loss made the statute unconstitutional. The Court seems

to rely on the magnitude of economic loss, but says nothing about the economic value of the loss either alone or in comparison with its overall profit or assets. At other points, the Court seems most unhappy about the frustration of the company's reliance on its right to mine (the company essentially had purchased from the Mahon's predecessors forty years previously the right to mine without regard to the effect on the surface owner's rights). But the opinion does not explain why such an old private bargain should prevent the state from passing safety legislation, especially given how dramatically environmental conditions had changed in Pennsylvania due to advances in mining technology.

Fourth, the opinion does not give sufficient honor to democratic lawmaking. Holmes plainly viewed the statute as the product of self-interested pressure by the voting majority of surface owners. But this statute does not seem exceptional in its mix of public and private motives. Even old and philosophic judges claiming authority upon tenuous interpretations of the Constitution really should not sneer at legislatures so cavalierly. The Constitution finally seeks to promote the process of democratic self-government.

Scholars have long wondered what Holmes thought he was doing. Frankfurter and Brandeis were embarrassed by the decision and suggested that the conservative justices had put one over the octogenarian Holmes while he was recovering from prostate surgery. No similar difficulty clouds evaluation of what the justices who joined Holmes opinion thought they were about. These were the same justices that struck down the federal minimum wage law in 1923 and 30 other exercises of state power between 1920 and 1923. These justices wielded the due process clause to preserve what they saw as the essence of laissez faire against democratic majorities. Pennsylvania Coal is part and parcel of the era of substantive due process, although the authorship of Holmes, who famously dissented in several due process cases, has obscured the point.

IV. Regulatory Takings Doctrine Is a Hopeless Muddle

Regulatory takings is not the only area of constitutional law where practitioners bemoan and scholars deplore the incoherence of precedents, but it does seem that no area of law has been the subject of more complaint or satire for sheer incomprehensibility. The Court itself notoriously confessed that "it has been unable to develop any 'set formula' for determining when 'justice and reason' require that economic injuries caused by public action require compensation." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). Justice Stevens acknowledged, "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of the Court's takings jurisprudence." Scholars have been less genteel, describing the area as a "muddle," "a chaos of confused argument" and a "welter of confusing and apparently incompatible results." In my view, the task the Court has set itself in regulatory takings cases cannot be met with principled distinctions; the doctrinal melee indicates that the effort should be abandoned, as the Court finally concluded in another area in Garcia v. San Antonio M.T.A., 469 U.S. 528 (1985).

If a lawyer wished to state current takings doctrine for a legally trained client, she would need to identify four separate clusters of rule-like utterance, any one of which might be taken from the shelf to decide a particular case, while acknowledging the distinct possibility that a case might be decided on some entirely novel basis.

1. The oldest (1978!) and most frequently invoked formulation comes from Penn Central: the Court will weigh in ad hoc balance the "character of the government action" (which seems in practice to include both the type of intrusion and the significance of public purpose being served), the economic loss that the action visits upon the property owner, and the degree to which the action upsets justifiable, invest-backed expectations. Each factor invites the

Court to make open-textured value judgments; moreover, the weight to be allocated among the various categories of conclusions may vary from case to case.

2. Two years after Penn Central, the Court held in Agins v. City of Tiburon, 447 U.S. 255 (1980), that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies the owner economically viable use of the land." This test seems quite different: an ordinance will be held unconstitutional if either one of two independent criteria are met. The first prong incorporates the means-ends test familiar from due process cases, but these clause have been thought to address different concerns. The second prong seems to require invalidation purely on the ground of economic loss, without regard to the competing factors stressed in Penn Central. This latter suggestion was followed to some extent in Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 (1992), where the Court held that new regulations that deprive an owner of all economic value in land must be considered a taking, unless the use prohibited could have been enjoined as a common law nuisance.

3. In Loretto v. Manhattan Teleprompter CATV, 458 U.S. 419 (1982), the Court held that any "permanent physical occupation" authorized by law of an owner's property would be considered a taking per se without regard to whether the occupation caused the owner any economic harm at all. The case involved an ordinance requiring apartment buildings to accept cable television wiring under their eaves. This rule builds upon a long tradition of equating physical occupation with appropriation and expresses the Court's longing for certain rules in at least one category of takings cases. As with any per se rule, the Court has had to engage in line drawing that has a somewhat artificial flavor; thus, in Loretto, itself, it distinguished permissible rules requiring apartment building owners to maintain fire extinguishers and

mailboxes on the premises, and in Yee, 112 S. Ct. 1522 (1992), it refused to find that statutory limitations on tenant eviction authorized a permanent physical occupation.

4. The Court justified its rule in Lorretto in part on the claim that the right to exclude others is "an essential attribute of property" that no regulation may abridge. This claim has opened a new field of doctrinal confusion as the Court has had to consider whether whatever use a law restricts is another essential attribute of property. So far the Court has held that the ability to bequeath land (Hodel v. Irving, 481 U.S. 704 (1987)) and the right to make some economic use of it (Lucas, supra,) are essential, but that the ability sell eagle wings (Andrus v. Allard, 444 U.S. 51 (1979)). Plainly, the Court has fallen into another thicket of natural law adjudication, and it is very difficult to see how the constitution authorizes or their other work equips the Justices to declare what are the "essential attributes" of property in the face of a contrary determination by a legislature generally empowered to make and alter property rules. In any event, it is anybody's guess what property rights are essential.

This brief summary quite fails to give the full measure of doctrinal confusion. There are subsidiary issues within the above categories that defy principled resolution. Perhaps the most notorious is the question about what baseline should be chosen to measure the degree of loss that an owner has suffered. Should it be the affected area only (e.g., the wetlands area that the developer cannot fill), the entire parcel (e.g., including the uplands area of the lot to be subdivided that may be developed), some larger configuration that includes property owned by the owner (now or in the relevant past) and used for similar purposes (e.g., all the developer's land in the area, perhaps including parcels recently subdivided and sold), or all the owner's property. Courts have employed all these approaches. Professor Michelman long ago despaired of finding any sensible solution for this problem

(Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967), and Justice Scalia admitted in Lucas that there is no logical basis to select one baseline rather than another (112 S. Ct. at 2894 n. 7). Different but equally grave doubts surround inquiries into when an owner's expectations deserve protection.

The doctrinal confusion recounted here is neither incidental nor temporary. It arises from the immensity of the task that the Court has set itself in regulatory takings cases: to mark as a matter of principle when limitations on property use become unfair. Philosophy suggests no consensus, and the Constitution affords no guidance, except to prescribe outright confiscation. The dimensions of property rights can be settled only contingently through the political process.

V. Federal Court Enforcement of the Regulatory Takings Doctrine Against the States Upsets Appropriate Understandings of Federalism.

Property makes an anomalous constitutional right. Unlike rights to freedom of speech or to resist self-incrimination, federal courts have no authority to elaborate the meaning and scope of property. Rather, as the Supreme Court has often reiterated, "Property interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984). Yet when the Court finds that a state land use regulation "takes" property, it is imposing a natural law of property rights upon the states' actual rules. This is most apparent in cases where the Court finds that a state has deprived an owner of an "essential attribute" of property, but it also is implicit in invalidation of a rule to protect the retention of interests by an owner gained under prior state law.

A vivid example of this inversion of federalism is Lucas v. South Carolina Coastal Commission, which, it will be recalled, requires compensation whenever a land use regulation deprives an owner of all economic value. Unless the prohibition duplicates a prohibition implicit in nuisance law or other state property doctrine. The bizarre effect of this rule is to give federal constitutional precedence to state judge-made common rules over state legislation in contravention of the state constitutional distribution of authority. The Lucas rule also seeks to reverse the practice of law-making that the states actually have pursued: during most of the Twentieth Century, states have dealt with external harms from property development through statutes and regulations so that they can 1) address widely distributed harms that are unlikely to be raised in individual lawsuits, 2) prevent harm before it occurs, 3) exploit scientific expertise, and 4) resolve value conflicts through democratic processes. As a result, nuisance law has become marginal and underdeveloped. The Court's takings approach thus reverse both the constitutional basis and the actual practice of state property rulemaking.

It seems fair to assert that Lucas and similar decisions presuppose a natural property right, the dimensions of which are unchanging. Consideration of the long history of English and American property law, however, strikingly suggests that property rights serve the interests of society as well as the individual and have evolved over time to accommodate changing social and economic interests and cultural understandings. American law has over time abolished feudal tenures, deprived husbands of legal rights in their wives' estates, revolutionized rights in water several times, and abolished slavery. (This point was recently well-made by Professor Sax in Lucas v. South Carolina Coastal Commission, 45 Stan. L. Rev. 1433 (1993).) In none of these cases (with narrow exceptions) were those who lost rights compensated.

Aggressive interpretation of the takings clause would frustrate this necessary process of accommodation between social needs and property rules. Indeed, the recent expansion of takings prohibitions seems designed to prevent the evolution of property law toward protection of broad ecological understandings. These changes may develop on two levels. First, as we become more aware of the environmental costs of development, regulations seek to force the developer to avoid, mitigate, or internalize the costs of the harms upon pain of prohibiting the development. Second, deep appreciation of the fragile basis of human flourishing within the web of nature may lead to greater respect for the integrity of the natural world through a more general restriction on the authority of individuals to plunder nature for wealth. Social and legal development along these lines remains uncertain (however desirable it may seem to some of us), but to the extent it occurs the takings clause ought not be a barrier. Byrne, Green Property, 7 Const. Comm. 239 (1990).

VI. Recent Expansion of Constitutional Property Rights Reflect An Illegitimate Attempt To Expand Judicial Power At the Expense Of Democratic Decisionmaking.

Expansive interpretation of the regulatory takings clause has become the focal point of efforts by a self-conscious group of lawyers to undermine the constitutional foundations of the regulatory state, particularly in the environmental area. The vagueness of the takings doctrine lends itself to such purposive reinterpretation, and the rhetorical overpromise of property veneration that typifies takings decisions invites it.

The movement has its embarrassing inconsistencies. Judges who built careers excoriating liberal judicial activism as subversive of representative government now find themselves inventing new rationales for discretionary judicial power. The locus classicus of this hypocrisy is volume 112 of the Supreme Court Reporter, where

one can read Justice Scalia's bitter denunciation of abortion decisions as the activism of an "Imperial Judiciary" based on "philosophic predilection and moral intuition" (pages 2873-2885), then turn the page to read his opinion in Lucas, which sweeps aside precedents reaching back into the nineteenth century and establishes a new ground for invalidating state law that has no basis in constitutional text or tradition, but enshrines his political preference.

The forum within which takings doctrine has been most energetically expanded has been the recently renamed Court of Federal Claims. In a remarkable series of cases the court has rejected Congress's judgment that preventing destruction of wetlands serves a substantial governmental interest, insisted that it would focus only the area where development could not occur to determine diminution in value, and held that a taking could be found even when the owner foresaw the denial of a permit when he bought the subject property. (See Ciampetti v. United States, 18 Cl.Ct. 548 (1989); Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381 (1988); Florida Rock Industries v. United States, 8 Cl.Ct. 160 (1985), aff'd in part, vacated in part, and remanded, 791 F.2d 893 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987), aff'd on remand 21 Cl.Ct. 161 (1990). In a recent eponymous case (Bowles v. United States, 1994 US Claims LEXIS 63), the court found that a lot owner had a constitutional right to build a septic system in a wetland. These cases perhaps suggest the folly of permitting a specialized court exclusive federal jurisdiction over an ideologically charged area of constitutional law.

VII. The Regulatory Takings Doctrine Does Not Promote Economic Efficiency

Generally, property owners challenge the constitutionality of land use regulations because they wish to pursue a profitable venture that an ordinance prohibits. This does not mean, of course,

that enforcement of a regulatory takings doctrine promotes economic efficiency or makes society wealthier in general. All development imposes costs on the community. Often these costs are not borne by the property owner, but by few or many neighbors. Accordingly the owners calculation of profit for himself does not mirror what may be a loss to the neighbors and to the community as a whole. Many barriers impede the creation of an efficient market within which to bargain out these issues.

Moreover, property values change over time as the values of different uses of resources change. Undeveloped land may have a certain value for development as a shopping mall on the outskirts of town, but its value in the undeveloped state to protect a water basin may rise as uncontaminated water becomes more scarce. Depriving an owner of a right to develop his land for a certain use for these reasons reflects not the law forcing a "sub-optimal use on an owner, but a social devaluation of the proposed use to the point where it is no longer optimal. Paying compensation for not undertaking a suboptimal use cannot improve efficiency. Moreover, even though such uncompensated changes in property rights will reduce the incentive to invest generally in current land uses, this may an efficient hedge against eventual decreases in the values of current land uses. Paying compensation perversely may induce overinvestment in currently favored land uses. See Richard Posner, *Economic Analysis of Law*, 59 et seq. (4th ed., 1992); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986).

VIII. The Regulatory Takings Doctrine Does Not Protect Fairness

The most persuasive argument for a regulatory takings regime is that there are some losses that ought to be borne by the society as a whole rather than by the individual upon whom they fall. But is not calamitous illness a better occasion for such socialization of loss than changes in property rules? Property owners insure

against many foreseeable losses, such as fire and earthquake; they similarly can insure (or hedge) against unfavorable changes in legal rules.

Property owners are not a "discrete and insular minority" whom would normally be thought to need enhanced constitutional protection against democratic lawmaking. Intentional singling out of particular landowners for penalty may be addressed under the due process or equal protection clauses. (See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

IX. A Statutory Proposal

Many foolish proposals have been put forward for legislation to compensate owners for regulatory losses. These focus either on mandating consideration of an inflated statement of the regulatory takings doctrine by government officials before they regulate, which adds expense to the regulatory process with doubtful benefit, or on requiring compensation for all or many regulatory losses, which would halt serious environmental regulation or provide large windfalls to owners.

Of far more benefit would be state statutes establishing rights of limited duration to build under existing regulatory permission; should these permissions be withdrawn before they expire, compensation would be required. In Germany, designation of use through an official map grants a right to develop within the terms of the map for several years. In England, planning permission (the grant of which is discretionary) gives the owner a right to develop that cannot be abrogated without payment of compensation. In the U.S., generally speaking, owners receive no right to build from plans, ordinances, official maps, or even the issuance of building permits. (See Donald Hagman & Julian Juergensmeyer, *Urban Planning Law* 153-58 (2d ed., 1986). Only actual expenditures in

reasonable reliance upon the building permit give the owner any rights against changes in the law.

A properly drawn state statute may direct the owner to when she may rely upon official permission to build. Setting the right at the time the permit is granted (or creating some more formal process of planning permission) will inform the owner of the moment from when she may rely upon the law not changing, thus clarifying the responsibilities of the agency and facilitating rational investment decisions. To afford an earlier guarantee (say, when the official map is promulgated) would require more serious planning processes than local governments have been willing to adopt.